U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 October 2003

CASE NO.: 2003-LHC-246

OWCP NO.: 07-158161

IN THE MATTER OF

LOCKETTA A. RIGGLE,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
Employer

APPEARANCES:

BILLY WRIGHT HILLEREN, ESQ.
On behalf of the Claimant

SUSAN SEVEL, ESQ. and
DONALD P. MOORE, ESQ.
On behalf of the Employer

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Locketta A. Riggle (Claimant) against Northrop Grumman Ship Systems (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Gulfport, Mississippi, on June 27, 2003. All parties were afforded a

full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-24; and
3. Employer's Exhibits 1-10.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2003-LHC-246 (JX-1):

1. Jurisdiction is not a contested issue. Claimant was employed as an insulator at Ingalls Shipyard, Pascagoula, Mississippi, adjoining the navigable waters of the Gulf of Mexico.

2. Date of injury/accident: October 2, 2000.

3. Injury in course and scope of employment: Admitted.

4. Employer/Employee relationship at time of accident: Admitted.

5. Date employer advised of injury: October 2, 2000. Note: Causation of hip, back and knee injury not admitted.

6. Date Notice of Controversion filed: October 9, 2000.

7. Date of informal conference: June 13, 2002.

8. Nature and extent of disability:

    a. Benefits paid: Temporary total disability from October 6, 2000, to October 10, 2000; 5/7 week at $233.46 per week. Total paid: $166.76.
    b. Medical benefits paid: $550.71.

II. ISSUES

The unresolved issues in this proceeding are:

1. Causation.

2. Average weekly wage.

3. Nature and extent of disability.

4. Section 7 medical benefits.

5. Employer's credit for compensation and wages paid.

6. Penalties, interest, attorney's fees and costs.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a forty-six year old woman with an 11th grade education. (Tr. 24-25). In the past, she has worked as an insulator, a cook and a caregiver. On March 13, 2000, Claimant was hired by Employer to work as a joiner/insulator in Department 17. (Tr. 25-26). She worked eight hours a day, five days a week, on the second shift, from 3:30 p.m. until 12 a.m. (Tr. 28). When Claimant first started working for Employer, she was paid about $15.07 per hour. (Tr. 28-29). She later received a pay raise. (Tr. 29).

As part of her duties, Claimant had to cut sheets of fiberglass insulation and secure it to the walls of boats using tools such as a hammer, a tape measure and a knife. (Tr. 26-27). Claimant often had to climb ladders or crawl into tight spaces on the floor in order to secure the insulation. (Tr. 27-28).

In late April 2000, Claimant missed about a week of work due to illness. (Tr. 30-31). She later missed about four weeks of work when she underwent hiatal hernia surgery. (Tr. 31). After she recovered from surgery, Claimant returned to full duty at the shipyard. (Tr. 32). She went on light duty in June or July 2000 after pulling a muscle in her back. (Tr. 32-33). This incident occurred when Claimant stepped off a porch and felt back pain. She testified that her back pain only lasted about a week. (Tr. 105-06).

On October 2, 2000, Claimant was injured when she fell down some steel stairs at work. Claimant slipped and fell, landing on her tailbone, then bounced up and landed again, sliding down the stairs. (Tr. 33-35). Claimant was put on a stretcher and taken to Singing River Hospital, where X-rays were taken and she was given pain medication. (Tr. 35-36). At the hospital, Claimant learned that her tailbone was broken. She testified that her back, tailbone and hips were hurting. She was told to rest for a few days and then see Dr. Warfield, the shipyard doctor. (Tr. 36).

When Claimant saw Dr. Warfield, he put her on light duty. Claimant returned to work on October 11, 2000, answering the phone and making copies in the foreman's

office. Claimant testified that she had difficulty standing or sitting and her hip hurt. (Tr. 37). As Claimant continued working on light duty for the next four weeks, Dr. Warfield advised her that her tailbone should heal on its own. (Tr. 37-38).

Because Claimant wanted a second opinion, she was given permission to see Dr. Hudson, an orthopedic surgeon. (Tr. 38). She testified that her complaints at that time were lower back pain, tailbone pain and pain in both hips and that her pain drawing markings indicated burning and aching in her hips, buttocks and back. (Tr. 38-39). Claimant affirmed that Dr. Hudson listed her chief complaint as tailbone pain. (Tr. 98). She agreed that her pain drawing contained "X" marks between the knee and buttocks area and that hips are above the buttocks but stated that even if she had not put the marks on the hip area, she did have pain in the hip area. (Tr. 98-99). Dr. Hudson told Claimant that her problems were caused by a coccyx fracture, which would take time to heal. (Tr. 39). Claimant did not remember if Dr. Hudson prescribed any medication for her. (Tr. 39-40). Dr. Hudson advised Claimant to limit her climbing and bending at work and to follow up with Dr. Warfield if she had any more problems. (Tr. 40).

Claimant testified that she had an incident on her porch in November 2000 when she slipped and hit the banister, but she denied that she fell down the stairs and reinjured her tailbone at that time. (Tr. 62). Claimant explained that the reason she slipped was because she had difficulty walking due to her broken tailbone. (Tr. 82). Claimant stated that she did not fall down but instead fell against the banister with her right arm and right side. Claimant saw Dr. Teresa Williamson, her family physician, for this injury, and at that time, Dr. Williamson observed that Claimant could not lift her leg. (Tr. 83). Claimant then explained to Dr. Williamson that she was unable to lift her leg because of her work-related tailbone injury. (Tr. 84). At the hearing, Claimant denied that the porch incident, rather than the workplace accident, was the reason for her initial visit to Dr. Hudson. (Tr. 63).

Claimant worked on light duty with Dr. Hudson's restrictions for about a week after her appointment with him. After that time, Claimant had to start working full duty with no limits on climbing or bending. She testified that she was unable to handle this work. Nonetheless, Claimant continued to work. In January 2001, she was given the choice of cleaning boats or being laid off, so she elected to clean boats. In February, Claimant returned to her regular insulator job. She testified that she was unable to handle the job because her hips, tailbone and back hurt, no matter whether she was walking, climbing or sitting. (Tr. 41). In addition, Claimant was having problems with her supervisor because he was unhappy with the way she was doing her job. (Tr. 41-42). At the end of February 2001, Claimant walked off the job because she could not do it anymore. She did not officially resign from the shipyard.

After Claimant left her job, she went to work as a caregiver for an elderly woman. (Tr. 42). Claimant worked four hours a day, three or four days a week and made

approximately $80 per week. (Tr. 43). She worked as a caregiver for about three or four months before leaving this job when the elderly woman passed away. (Tr. 43-44). Claimant next worked for a company called Firestock, but she quit after two days because the job required her to climb ladders. Claimant testified she was unable to climb because of her hip and back pain. (Tr. 44). Claimant then went to work at Cone Oil as a grill cook. (Tr. 44-45). She worked five days a week for a total of thirty-two hours weekly at an hourly wage of $7.50. Claimant's duties included working the grill, washing dishes and sweeping and mopping her area. She worked at Cone for about six weeks before quitting. Claimant testified that she quit because she was assigned to mop and sweep the front area, and it was too much for her to do because of her pain. (Tr. 45). On cross examination, Claimant acknowledged that given her prior work history of leaving jobs after a short time, it was not unusual that she had three jobs in a short period of time after leaving the shipyard. (Tr. 61). However, Claimant has never left any other job because she was physically unable to do the work. (Tr. 93-94).

In December 2001, Claimant began working for Swetman's Security and was assigned to the security gate at Chevron. (Tr. 45-46, 47-48). She worked a twelve hour shift and spent most of this time sitting behind a desk at the gatehouse. For two hours in the morning and two hours in the afternoon, however, Claimant had to stand outside directing traffic and checking in trucks. (Tr. 46-47). Claimant left the job with Swetman to undergo hip surgery. (Tr. 48, 93).

According to Claimant, her physical condition improved somewhat after she left the shipyard, but as the year progressed, her pain started to increase. (Tr. 48-49). However, Claimant did not actually see a doctor about her problems until January 2002. She testified that she did not go to a doctor sooner because she had been told that her tailbone would take some time to heal, so she saw no point in going back to the doctor. (Tr. 49). Claimant testified that although she did not sustain any other accidents or injuries after her October 2000 workplace accident, she finally decided to go to the doctor when her hip and lower back pain got so bad that she was unable to function. (Tr. 49-50, 61-62).

Claimant acknowledged that when she treated with Dr. Williamson in December 2000, she did not complain of hip or back pain. She testified that she had no pain at that time. (Tr. 67). In January 2001, Claimant again saw Dr. Williamson but did not complain of back or hip pain because "I wasn't going [to] her for that." (Tr. 67-68, 88). When Claimant saw Dr. Williamson on February 20, 2001, just before she quit work at the shipyard, she did not complain of any back, hip or tailbone pain. Claimant explained that she went to Dr. Williamson to be treated for asthma. (Tr. 68).

Claimant saw Dr. Dunk Ellis in January 2002. (Tr. 50, 68). She did not ask for approval to see Dr. Ellis. (Tr. 68). Claimant testified that she had no idea why her hips were hurting. (Tr. 50). She told Dr. Ellis about her fall in the shipyard but did not

mention that she had also slipped on her porch in November 2000. (Tr. 50, 72). Claimant acknowledged that she also told Dr. Ellis that her onset of pain had begun two months previously when her pain began to increase until one morning she heard a loud snap and felt extreme pain in her left hip. (Tr. 68-69). Claimant initially testified that her visit with Dr. Ellis was the first time she complained of hip pain but later noted that she previously had complained of hip pain to Dr. Hudson. (Tr. 69, 88). Dr. Ellis sent Claimant for an MRI and a bone scan and told her that she had avascular necrosis caused by a trauma or a fall. (Tr. 50-51). Dr. Ellis prescribed some pain medication and some asthma medication and referred Claimant to Dr. Charlton Barnes, an orthopedic surgeon. (Tr. 51). Claimant affirmed that Dr. Ellis prescribed a Medrol Dose Pak for her asthma, and she thought that she might have been prescribed the same medication before by Dr. Williamson. She testified that this medication is only taken for seven days at a time. (Tr. 52).

Claimant saw Dr. Barnes shortly after her appointment with Dr. Ellis in January 2002. Dr. Barnes ordered an MRI and confirmed that Claimant suffered from avascular necrosis. According to Claimant, Dr. Barnes told her that this condition is caused by a trauma or fall, and at that point, she told him about her October 2000 workplace fall. (Tr. 53). Although Dr. Barnes' records indicated that Claimant had fallen twelve feet and landed on the stairs, Claimant testified that Dr. Barnes misunderstood and that she in fact fell down twelve stairs, a distance of approximately twelve feet. (Tr. 89-91). Claimant did not tell Dr. Barnes about the slip on her porch steps in November 2000. (Tr. 72). Dr. Barnes prescribed some pain medication and recommended a total hip replacement for both hips. (Tr. 53-54). Claimant did not ask for approval from Employer before treating with Dr. Barnes and reasoned that since she no longer worked for Employer, she had no reason to seek approval for this treatment. (Tr. 70, 102-03). Claimant never notified Employer of her problems or requested authorization for the hip surgery. (Tr. 101).

Claimant underwent surgery on her right hip in February 2002. (Tr. 54-55). Claimant remained in the hospital for five days before coming home. She underwent physical therapy exercises at home. Claimant took pain medication as well as Coumadin, a medicine to prevent her blood from clotting. (Tr. 55). In June 2002, Claimant underwent surgery on her left hip. Claimant testified that she has never fully recovered the use of either hip. (Tr. 57). Claimant is unable to walk without a cane and feels constant back and hip pain when ambulating. (Tr. 56-57). In addition, Claimant's back pain has increased since her surgeries, and she also suffers from knee problems. (Tr. 57-58). She has been diagnosed with a bulged disc in her lumbar spine and arthritis in her knees. (Tr. 58). In addition, Claimant has developed high blood pressure since her surgery and takes medication for this condition. She testified that she never had high blood pressure before last fall. Dr. Williamson told Claimant that her high blood pressure might be caused by pain. (Tr. 59).

Claimant has suffered from asthma since 1992. Although she takes medication for her asthma, it has not prevented her from working. (Tr. 29). Claimant currently takes Combivent and Albuterol for her asthma. She testified that neither of these medications contains steroids. (Tr. 30). She takes her inhaler four times a day and uses her breathing machine three to four times a day as needed. (Tr. 75). In the past, Claimant has taken Proventil, Singulair, Serevent, Flovent, Prednisone and Medrol for her asthma. (Tr. 74-77). She affirmed that these are the same types of medication that she now takes. (Tr. 75). Claimant acknowledged that she has been prescribed medications containing steroids, but "it don't mean I take them." (Tr. 78-79). Claimant admitted that she has taken steroid medications on a few occasions since 1997. (Tr. 97). Claimant explained, however, that the last few times that Dr. Williamson has prescribed steroid medications, she has not filled the prescriptions because steroids "make you swell up and puffy." (Tr. 92). Claimant affirmed that Dr. Williamson explained to her that some of her asthma medications contain steroids. She testified that Dr. Williamson only prescribes steroid medication for one week at a time and that she has never taken steroid medications on a prolonged basis. (Tr. 91-93).

Claimant has been paid no compensation by Employer since October 2000. (Tr. 58). Medicaid has paid for some of her medical bills, but she still has some medical bills outstanding. (Tr. 58-59). Claimant testified that when she still worked for Employer, her co-workers advised her to get an attorney but she did not hire an attorney until after she left the shipyard. (Tr. 102-04). Claimant is currently unable to work, but she hopes to return to work someday if her physical condition improves. (Tr. 94).

Deposition of Charlton H. Barnes, M.D.

Dr. Barnes is an orthopedic surgeon who first saw Claimant on January 28, 2002. (CX. 22, pp. 6, 8). Claimant, who was referred by Dr. Ellis, complained that her hips hurt and that she had no idea what was causing the pain. (CX. 22, pp. 8-9). Claimant told Dr. Barnes that she had been injured in a fall while working in the shipyard. Claimant was having difficulty walking and had trouble getting onto the exam table. She had pain in her groin area. Claimant's previous X-rays showed possible aseptic necrosis. (CX. 22, p. 9). Dr. Barnes explained that aseptic necrosis is a condition that occurs when the blood supply to the bone of the ball of the hip dies or is stopped. Over time, the bone becomes weak and collapses. There is no difference between aseptic necrosis, avascular necrosis and ischemic necrosis. (CX. 22, p. 10). A bone scan indicated that Claimant's left hip was positive and her right hip was mildly positive for aseptic necrosis. (CX. 22, pp. 9-10). Dr. Barnes ordered an MRI of both hips so that he could verify whether Claimant suffered from this condition. (CX. 22, pp. 10-11).

Dr. Barnes next saw Claimant on February 4, 2002. (CX. 22, p. 11). The MRI showed avascular necrosis of both femoral heads. The femoral head is the ball of the hip. Dr. Barnes diagnosed Claimant with bilateral avascular necrosis. He noted that Claimant

walked with a very antalgic gait and had severe pain on internal rotation. (CX. 22, pp. 12-13). Dr. Barnes planned to set Claimant up for total hip replacement surgery on her right hip. He gave her a walker and prescribed some pain medication. (CX. 22, pp. 15-16). Dr. Barnes affirmed his opinion that the surgery was a reasonable and necessary treatment, given Claimant's condition. (CX. 22, p. 16).

Dr. Barnes was unable to determine how long it had taken for Claimant's condition to develop. (CX. 22, p. 13). He testified that it was possible that Claimant's workplace accident could be the source of her bilateral avascular necrosis, but there is no way to tell how these conditions occur and develop. (CX. 22, pp. 14-15). Dr. Barnes explained determining the cause is "more like elimination and association." (CX. 22, p. 14). He was unaware that Claimant missed less than a week of work after her workplace injury and ultimately returned to full duty work without restrictions. (CX. 22, pp. 32-33). Dr. Barnes also did not know that Claimant had quit working at the shipyard in February 2001 and had not sought medical treatment for over a year after her injury before going to see Dr. Ellis. (CX. 22, p. 34).

According to Dr. Barnes, the most frequently occurring source of bilateral avascular necrosis is cortisone steroid treatment, with trauma being the second most frequent. He thought that Claimant had denied ever having cortisone injections. (CX. 22, p. 15). Dr. Barnes did not know whether smoking contributes to bilateral avascular necrosis. (CX. 22, p. 29). He suggested diabetes as another possible cause—"anything that would obliterate some of the small vessels to your bones." (CX. 22, pp. 29-30). In Dr. Barnes' testimony, he stated that he did not know that Claimant smoked two packs of cigarettes a day for over thirty years, that she had smoking-related health problems, such as emphysema and COPD, or that she was diagnosed with asthma about ten years ago. (CX. 22, p. 30). He later noted, however, that his medical records indicated that Claimant had told him that she was a smoker and suffered from asthma and bronchitis. (CX. 22, p. 32). Dr. Barnes testified that he does not treat asthma but he thought that sometimes asthma is treated with steroid medication. (CX. 22, pp. 30-31). He agreed that it was possible that Claimant's use of steroid medication to treat her asthma could be a possible cause of her avascular necrosis. (CX. 22, p. 31). Dr. Barnes also agreed that it would probably take prolonged use of steroids to bring on this condition. (CX. 22, p. 45).

Dr. Barnes was given a hypothetical situation in which a person falls at work and fractures his coccyx, is returned to full duty work and later leaves that employer and has a history of smoking and smoking-related problems and asthma with associated steroid medication use. (CX. 22, pp. 34-35). Dr. Barnes was then asked whether he could state, based upon a reasonable degree of medical probability, whether the person's avascular necrosis was related to the steroid usage as opposed to the fall. He testified that it would be difficult to know the cause in that situation but agreed it was possible that the avascular necrosis could be related to the steroid ingestion and not the injury. (CX. 22, p. 35). Dr. Barnes stated that in cases of avascular necrosis related to trauma, a fractured

pelvis or a dislocated hip would be a common cause. (CX. 22, pp. 36-37). Based on Claimant's medical history, Dr. Barnes believed that her October 2000 workplace injury was more likely than not the cause of her avascular necrosis, but he acknowledged that some other undisclosed trauma could have been the cause. (CX. 22, pp. 48, 51).

After Claimant's first surgery, Dr. Barnes put her on Coumadin so that she did not develop a blood clot in her legs. He monitored this condition for about three months and ordered home health care for Claimant as well. (CX. 22, p. 18). Dr. Barnes testified that the purpose of home health care is to help post-surgical patients in their daily tasks as they adjust to their condition. (CX. 22, pp. 18-19).

Dr. Barnes performed a total hip replacement of Claimant's left hip on June 7, 2002, using the same procedure as before and ordering Coumadin and home health care for the post-surgical recovery period. In August 2002, Dr. Barnes ordered physical therapy to help Claimant regain her ability to walk. (CX. 22, p. 20). However, Claimant continued to have difficulty walking. (CX. 22, p. 21). On October 15, 2002, Claimant was still having difficulty with her left leg. She told Dr. Barnes that her right hip felt fine but her left hip and the back of her left leg were bothering her. Claimant continued to walk with a cane and had a marked limp. Dr. Barnes recommended a neurological examination. (CX. 22, p. 21). Dr. Barnes affirmed that his medical records for this appointment indicated that Claimant's bilateral avascular necrosis was due to her shipyard injury. (CX. 22, pp. 21-22).

On December 24, 2002, Claimant complained of back trouble. Dr. Barnes noted that she walked with marked difficulty and a severely antalgic gait. Dr. Barnes agreed that it is possible for people with an abnormal walking pattern to develop back problems as a result of their altered gait but testified that he did not know if this was the reason why Claimant had back problems. (CX. 22, p. 22).

On January 7, 2003, Dr. Barnes ordered a myelogram with CT scan to follow up on Claimant's back complaints. (CX. 22, p. 23). The myelogram showed that Claimant had an extradural defect, possibly a bulged disc, at L2-3, mild stenosis and a minimal defect at L4-5. (CX. 22, pp. 23-24). Dr. Barnes acknowledged that this condition might have been related to Claimant's workplace accident but indicated that there was no way to be sure of the cause. (CX. 22, p. 24). He agreed that if Claimant had not complained of back problems prior to her injury and subsequent hip surgeries, it would be more likely than not that the back complaints were a result of either the injury or of Claimant's abnormal walking pattern following surgery. (CX. 22, pp. 24-25).

Dr. Barnes confirmed that on Claimant's most recent visits to his office, in April and May 2003, she complained of knee pain and was diagnosed with arthritis in both knees after a bone scan. (CX. 22, p. 25). He testified that it was possible that Claimant's knee problems were related to her abnormal gait but said he could not be sure of the

cause without knowing more of Claimant's medical history. (CX. 22, p. 26). Dr. Barnes agreed that he could not definitively relate Claimant's knee arthritis to her workplace accident. (CX. 22, p. 41).

Dr. Barnes affirmed that Claimant has been unable to work since her first hip surgery in February 2002, and he testified that she has not reached maximum medical improvement (MMI). (CX. 22, pp. 26-27). Although Dr. Barnes did not have an anticipated MMI date, he stated that he hoped Claimant would "get a lot better than she is now." (CX. 22, p. 37). Dr. Barnes noted that while it is hard to say how long the recovery period will be after this type of surgery, Claimant has had a difficult time with her recovery. (CX. 22, p. 19). He hoped Claimant would improve enough to be able to return to work someday. Dr. Barnes testified that if Claimant did reach MMI and return to work, her only permanent restrictions would be to avoid hyperflexion and internal rotation of her hips. (CX. 22, p. 37). He anticipated that Claimant would be assigned a permanent impairment rating after reaching MMI but did not know what that rating would be. (CX. 22, p. 38).

Dr. Barnes testified that Medicaid paid for many of Claimant's appointments with him. (CX. 22, p. 27).

Medical Records of Singing River Hospital

Claimant was sent to the emergency room following her October 2, 2000 workplace accident. At the emergency room, Claimant complained of tailbone pain but denied any other injuries. (CX. 18, p. 7). X-rays of the lumbrosacral spine and coccyx revealed a nondisplaced fracture of the coccyx. Claimant was prescribed pain medication and told to follow up with Dr. Warfield. (CX. 18, p. 8).

Medical Records of Ingalls Hospital

On October 10, 2000, Dr. Warfield released Claimant to office work. Because she had fractured her coccyx, she was not to engage in any climbing or lifting. (CX. 13, p. 7). On October 16 and 19, 2000, Dr. Warfield renewed the no climbing restriction and kept Claimant assigned to office work. (CX. 13, pp. 8, 9). On October 30, 2000, Claimant's only restriction was to limit climbing. (CX. 13, p. 10). On November 9, 2000, Dr. Hudson placed the following restrictions on Claimant: limited ladder climbing, limited stooping, limited bending and no lifting over twenty pounds. (CX. 13, p. 11).

Medical Records of Jim K. Hudson, M.D.

Claimant visited Dr. Hudson on November 8, 2000. Her chief complaint at that time was tailbone pain without significant radiation. Dr. Hudson recounted the history of Claimant's October 2000 workplace injury. Claimant reported that her tailbone pain

increased with bending and climbing. She had no prior history of tailbone region pain. Dr. Hudson noted that Claimant was a two pack a day cigarette smoker. (CX. 14, p. 4).

Claimant filled out a pain drawing for her appointment. The drawing indicated that Claimant felt an ache in her tailbone area and in the right buttocks area below the hip. Claimant also marked areas where she felt a burning sensation on her left and right legs above the knee. (CX. 14, p. 7).

Upon physical examination, Claimant had midline tenderness over the tip of the coccyx but the exam was otherwise negative and she had no sensory, motor or reflex deficit. Dr. Hudson noted no change in Claimant's pain character to an isolated hip motion or a straight leg raise maneuver. He confirmed that the X-rays showed a fractured coccyx. Dr. Hudson commented that this type of injury is painful but usually resolves on its own. He felt that Claimant had been treated properly and would eventually overcome her symptoms without any impairment. He placed the limited bending and ladder climbing and light lifting work restrictions on Claimant and told her to follow up with Dr. Warfield. (CX. 14, p. 4).

Medical Records of Dunk A. Ellis, M.D.

On January 9, 2002, Claimant saw Dr. Ellis. She complained of extreme pain in her left hip. She explained that she had fallen at work and broken her tailbone nearly two years previous, but she had gotten better. Claimant reported that about two months ago, her pain had begun to increase, and then one morning as she got out of bed, she heard a loud snap and had extreme pain in her left hip. She thought she had pulled a muscle and had tried to walk it out but had to use a cane. (CX. 15, p. 5). A radiograph taken on January 8, 2002, revealed no bony abnormalities of the hips or pelvis. (CX. 15, p. 4). A bone scan taken on January 18, 2002, revealed abnormal findings compatible with bilateral aseptic necrosis. (CX. 15, p. 7).

Medical Records of Terry J. Millette, M.D.

Claimant saw Dr. Millette, a neurologist, on October 28, 2002. She reported knee pain and groin pain. Claimant told Dr. Millette that walking exacerbated her pain. Upon physical examination, Claimant was sensitive over her scars in both hips and had mild sacroiliac joint tenderness. Claimant had no lumbar tenderness. Her cranial nerve examination revealed no abnormalities, and her motor exam was likewise normal. Dr. Millette's impressions included mechanical back problems, bilateral hip pain and sacroiliac joint tenderness. Dr. Millette prescribed some Neurontin for Claimant. (CX. 17, p. 2).

Medical Records of Teresa Williamson, M.D.

On June 5, 2000, Claimant saw Dr. Williamson for lower back pain and leg pain. Claimant reported that a few days before, she had stepped off a porch and felt a pull in her legs, as well as some back pain, which had increased over the next several days. Claimant stated that her legs felt stiff and numb and that it hurt to bend them. Upon physical examination, Claimant exhibited slight tenderness in the right lower back area, and straight leg raising was positive on the right. Dr. Williamson diagnosed Claimant with neuritis bilaterally with back pain. She told Claimant to follow up if there was no improvement in the next few days. (EX. 8, p. 18).

On June 29, 2000, Claimant returned to see Dr. Williamson, complaining that her asthma was acting up. Claimant was taking Flovent and had been taking Singulair and Proventil nebulized solution until she ran out. At the time, Claimant was a smoker. Dr. Williamson gave Claimant a Proventil treatment and told her to continue using the Flovent inhaler, Singulair and Proventil nebulized treatment as directed. Dr. Williamson also prescribed Serevent, another inhaler, and told Claimant to follow up if her condition did not improve. (EX. 8, p. 17).

Dr. Williamson next saw Claimant on November 3, 2000. According to Dr. Williamson's notes, Claimant reported that she had fallen down some stairs on November 1 and was having trouble walking. Claimant told Dr. Williamson that she previously had broken her tailbone, and Dr. Williamson speculated that Claimant might have reinjured it when she fell. Upon physical examination, Dr. Williamson noted point tenderness over Claimant's lower paraspinous muscles bilaterally, especially over her tailbone. The straight leg raising test was negative. Dr. Williamson prescribed some Flexeril and told Claimant to take Tylenol for her pain and follow up if there was no improvement in her condition. (EX. 8, p. 16).

On January 25, 2001, Claimant complained of fever, cough, congestion and headache. She reported that she was using nebulized treatments at home and that her lungs felt alright. Dr. Williamson prescribed some medication and instructed Claimant to follow up if there was no improvement in her condition. (EX. 8, p. 12). On January 29, Claimant still was not feeling better and complained of sinus congestion and drainage and body aches. Dr. Williamson planned to test Claimant for the flu. In the meantime, Claimant was instructed to keep taking her antibiotics. (EX. 8, p. 11).

On February 20, 2001, Claimant complained of dizziness, shortness of breath and neck pains. She also reported feeling depressed and said that she was having a difficult time going to work and being around other people. Dr. Williamson noted that Claimant smoked two packs of cigarettes a day and had a history of brochospasm. Claimant was taking Allegra, Combivent and Albuterol. Dr. Williamson diagnosed Claimant with depression, bronchitis and vertigo. Claimant was instructed to use the Albuterol

nebulizer every four hours and was prescribed medications for her congestion and cough and her depression. Claimant was to return in two weeks for another evaluation. (EX. 8, p. 10).

When Dr. Williamson saw Claimant on September 27, 2002, Claimant reported headaches, blurred vision and elevated blood pressure. Dr. Williamson noted that Claimant was undergoing physical therapy after her bilateral hip replacement. The doctor also noted that Claimant's COPD was stable. Dr. Williamson prescribed some medication and planned to order some lab work and follow up with Claimant in two weeks. (EX. 8, p. 8). On October 21, Claimant complained of headaches and dizziness. Dr. Williamson's impressions were musculoskeletal pain, hypertension and history of COPD. Dr. Williamson prescribed some anti-inflammatory medication and planned to send Claimant to physical therapy. Claimant was to follow up if there was no improvement in her condition. (EX. 8, p. 7).

On April 7, 2003, Claimant complained of shortness of breath over the past four days. She was using Albuterol nebulizer one to two times per day and denied any chest pain. Dr. Williamson prescribed a Medrol dosepak and told Claimant to increase her nebulized treatments to every four hours. Claimant was to return to see Dr. Williamson if her condition worsened. (EX. 8, p. 6). When Claimant next saw Dr. Williamson on May 13, she complained of suffering from cough and congestion for the past four days. Claimant was prescribed some medication and told to follow up if her condition did not improve. (EX. 8, p. 5).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equip. & Mach. Co. v. Newman, 460 F.2d 1241, 1243 (5th Cir. 1972).

Employer in this case has argued that there are numerous inconsistencies between Claimant's testimony and the medical records and that Claimant is not a credible witness. Although Claimant's testimony did contain discrepancies with regard to her deposition testimony and the medical records, Claimant did not appear to be changing her story. Rather, Claimant's testimony at the hearing was an attempt to clarify some of the earlier, unclear statements made both in her deposition and to the various doctors with whom she treated. I found Claimant in this case to be a credible witness and I have weighed her testimony accordingly.

Timely Notice of Injury

Section 12(a) of the Act provides that notice of an injury or death for which compensation is payable must be given within thirty days after injury or death, or within thirty days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. It is the claimant's burden to establish timely notice.

Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34 (1989); Sheek v. General Dynamics Corp., 18 BRBS 151 (1986). Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978); White v. Sealand Terminal Corp., 13 BRBS 1021 (1981). Where the employer has knowledge of a work-related accident but does not have knowledge of the resulting injury, the employer will be deemed not to have knowledge of a work-related accident under Section 12(d). Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

The date of a medical diagnosis, although significant, is not always controlling. It does not exclude a finding that claimant knew or should have known of the relationship

between his injury and his employment at an earlier date. On the other hand, one physician's unconfirmed diagnosis is not sufficient to make the claimant reasonably aware of a loss of wage-earning capacity in light of a contrary, though wrong, diagnosis by the claimant's treating physician and the claimant's continued ability to perform his work. Gregory v. Southeastern Maritime Co., 25 BRBS 188 (1991). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. Swanigan v. Maersk Pac. Ltd., 35 BRBS 23 (ALJ) (2001) (citing Thorud v. Brady-Hamilton Stevedoring Co., 18 BRBS 232 (1986)).

In support of its argument that Claimant's claim is time-barred, Employer cites the case of Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 (1989). In Addison, the claimant suffered a workplace accident in December 1979, sustaining injuries to his chest, shoulder, neck and arm. Id. at 33. In January 1982, the claimant filed a claim for compensation under the Act for a back condition which he claimed as a result of his workplace accident. Id. While the claimant argued that the employer's knowledge of his accident at the time it occurred was sufficient notice, the employer argued that notice of claimant's chest, shoulder, neck and arm injuries was insufficient to provide employer with notice of a back injury. Id. at 33-34. Although the administrative law judge credited claimant's testimony that he had been aware of the relationship between his back injury and his employment since the December 1979 accident and had reported it to the doctors treating him, the judge noted that the doctor initially treating claimant reported no complaints of back pain. Id. at 35. In addition, once the claimant did complain of back pain to another doctor in March 1980, he filed for treatment with his group insurance carrier rather than filing a claim for compensation under the Act. Id. Based on these facts, the Benefits Review Board rejected the claimant's argument that notification of the accident was sufficient to notify employer of the back injury. Id. The Board affirmed the administrative law judge's finding that employer was prejudiced by the lack of timely notice of claimant's back injury and upheld the judge's finding that the claimant's disability claim was time-barred under Section 12. Id. at 35-36.

In the case at bar, despite Claimant's testimony that she told Dr. Hudson about her hip pain and indicated it on her pain drawing, Dr. Hudson made no note of the hip pain complaint nor did Claimant's pain drawing indicate hip pain. In addition, Claimant was returned to work with no permanent restrictions and never sought Employer's approval to see another doctor. Claimant simply walked off the job in February 2001 and never informed Employer that her reason for doing so was that she was unable to tolerate the work. Employer thus had no notice that Claimant was suffering from any injury, let alone a hip injury, until Claimant filed the LS-203 on March 18, 2002. (CX. 1). In turn, given the evidence in this case, Claimant herself cannot be said to have had any knowledge of the relationship between her injury, employment and disability until Dr. Ellis diagnosed her with avascular necrosis in January 2002 and told her that the injury could be caused by trauma. Claimant testified that up until that point, she had no idea

why her hips were hurting. I find that Claimant was aware of the relationship between her hip injuries and her employment on January 9, 2002.

Although Claimant first saw Dr. Ellis on January 9, 2002, she did not file the LS-203 until over two months later, after she had already undergone total hip replacement surgery on her right hip. I find that Claimant failed to provide timely notice of her hip injuries to Employer. In addition, I find that Claimant cannot seek the shelter of the Section 12(d) exceptions as to her right hip injury based on the circumstances. Employer in this case never had the opportunity to investigate Claimant's right hip condition by having her examined by its own specialists, nor was Employer given the opportunity to determine whether Claimant's avascular necrosis was causally related to her employment. Employer was thereby prejudiced by Claimant's failure to provide timely notice of her right hip injury once she became aware of the possible connection between her workplace accident and her avascular necrosis. Consequently, I find that Claimant's claim for compensation for her right hip injury is time-barred under the Act.

In support of Employer's argument that it was prejudiced by Claimant's failure to give timely notice as to all of her injuries, Employer cites Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1276 (9th Cir. 1998). In Kashuba, the Ninth Circuit held that the employer was prejudiced by the claimant's failure to given notice when the employer did not receive notice of the claim until four months after the injury and six weeks after the claimant had undergone back surgery. Id. The court noted that the claimant's failure to report the injury prejudiced the employer by preventing the employer from obtaining a second opinion before undergoing surgery and from disproving its liability for the claim. Id. In applying the logic of this holding to the instant case, it is clear that while Employer was prejudiced by Claimant's failure to give notice before undergoing right hip surgery, Employer was not prevented from obtaining a second opinion before Claimant underwent left hip surgery. Instead, Employer simply did not attempt to obtain a second opinion. Thus, Employer was not prejudiced by Claimant's failure to give timely notice as to the left hip injury.

Although Claimant did fail to notify Employer of her avascular necrosis and its possible connection to her workplace accident within the requisite thirty days after she discovered the relationship between the two, Claimant had not yet undergone the total hip replacement surgery on her left hip. Consequently, Employer did have an opportunity to investigate the cause of the injury and to determine the nature and extent of Claimant's avascular necrosis with respect to her left hip, as well as the causality, nature and extent of Claimant's back and leg injuries, which were also listed on the LS-203. Accordingly, as to Claimant's left hip injury, lower back pain and knee arthritis, I find that Employer was not prejudiced by Claimant's failure to timely notify under Section 12. Claimant's failure to timely notify Employer as to these three injuries is hereby excused, and her claim for compensation as to these injuries is not barred.

Statute of Limitations

Section 13(a) of the Act states that, except as otherwise provided in the section, the right to compensation for disability or death shall be barred unless the claim is filed within one year from the time the claimant or the beneficiary becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

Section 13(b)(1) of the Act provides:

> Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

Claimant in this case has argued that since Employer did not raise the statute of limitations defense at the informal conference before the hearing, Employer's raising of the defense at the formal hearing is time-barred. However, the "first hearing" for purposes of the Act refers to the hearing before the administrative law judge and not the proceedings before the deputy commissioner. Lewis v. Norfolk Shipbldg. & Dry Dock Corp., 20 BRBS 126, 129 (1987) (citing Carlow v. General Dynamics Corp., 15 BRBS 115, 121 n.5 (1982)). Thus, I find that Employer's Section 13(a) defense is not time-barred.

As previously noted, Claimant's claim for compensation for her right hip injury is time-barred as per Section 12. However, the evidence indicates that Claimant learned of the relationship between her injury and her employment in January 2002, when she first saw Dr. Ellis. Consequently, because Claimant did file her claim for compensation in March 2002, well within one year of becoming aware of the relationship between her injuries and her employment, her claim with respect to the left hip, back and knee injuries shall be allowed.

Causation

Section 20(a) of the Act, 33 U.S.C. § 920(a), provides a claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

The first prong of Claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> 33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954).

The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). In relating the injury to the employment, however, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

The second prong of Claimant's prima facie case requires him to show the occurrence of an accident or the existence of working conditions which could have caused, aggravated or accelerated the condition. The 20(a) presumption does not assist Claimant in establishing the existence of a work-related accident. Mock v. Newport News Shipbldg. & Dry Dock Co., 14 BRBS 275 (1981). Therefore, like any other element of his case to which a presumption does not apply, Claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence.

The Court must weigh all the record evidence, whether it supports or contradicts the claimant's testimony, in order to determine whether the claimant has met his burden in establishing the existence of a workplace accident.

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the claimant's prima facie case with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive

evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690. An unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the presumption. Charpentier v. Ortco Contractors, Inc., No. 00-0812 (BRB May 9, 2001) (citing O'Kelley v. Department of the Army/NAF, 34 BRBS 39 (2000)).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Avascular Necrosis

In this case, it is undisputed that Claimant sustained a workplace injury when she fell down some stairs and fractured her coccyx in October 2000. It is further undisputed that Claimant suffers from avascular necrosis. The issue, however, is whether there is a causal link between the workplace injury and the onset of avascular necrosis over a year later. According to Claimant, she never fully recovered from the tailbone injury, but she did not see a doctor about her condition for over a year, because Dr. Hudson and Dr. Warfield told her that the fracture would heal itself over time. Claimant testified that although she did not see Dr. Ellis for her hip pain until January 2002, she had intended to indicate on a pain drawing that she had right hip pain shortly after her accident when she saw Dr. Hudson. Claimant explained that her hip pain had began to increase about two months before she saw Dr. Ellis, and then one day she heard a loud snap and felt pain in her left hip when getting out of bed. Soon after Claimant sought medical treatment for her hip pain, she was diagnosed with avascular necrosis.

I find that Claimant has established a prima facie case for the causal relation between her coccyx fracture and her development of avascular necrosis. Not only did Claimant undisputedly suffer a work-related injury, but Dr. Barnes, her orthopedic surgeon, testified that this injury was more likely than not the cause of her avascular necrosis. Claimant is thus entitled to the 20(a) presumption with regard to the causation of her hip problems.

Employer has argued that the evidence as a whole does not support a finding that Claimant's avascular necrosis is causally related to her workplace injury. First, Employer argues that the Claimant's own testimony is not credible. Specifically, Employer notes the discrepancies between Claimant's testimony as to the complaints she related to Dr. Hudson and Dr. Hudson's medical records with respect to the pain drawing. Employer further notes that Claimant sustained some sort of accident at her home in November 2000 and that medical records indicate that she fell while going down the stairs, possibly

reinjuring her tailbone, although Claimant herself testified that she only slipped and did not reinjure her tailbone. Second, Employer points out that Claimant was returned to work without permanent restrictions shortly after her workplace accident and continued to work at the shipyard without complaints for an additional five months before quitting. In addition, Claimant did not seek medical treatment for her hip pain until over a year after her workplace injury occurred. Employer also cites the testimony of Dr. Barnes, who could not say within a reasonable degree of medical probability that Claimant's avascular necrosis was caused by her workplace injury but only that it was a possibility based on the medical history given by Claimant. Further, Dr. Barnes testified that the most common cause of avascular necrosis is steroid usage. Claimant has asthma and has been prescribed medication containing steroids on several occasions since her diagnosis in 1992. I find that Employer has provided sufficient evidence to rebut the 20(a) presumption and I must now evaluate the record as a whole to determine the issue of causation as to the avascular necrosis.

As I have already noted, Claimant is a credible witness and there is no argument over whether she suffers from avascular necrosis. The medical evidence in this case essentially indicates that there is no way of ascertaining the cause of Claimant's avascular necrosis other than speculating on the possible causes given her medical history. Relying on Claimant's testimony, then, the fact is that Claimant sustained a workplace injury to her tailbone from which she did not fully recover, eventually leading her to leave her employment at the shipyard. About a year later, Claimant began suffering from hip pain which culminated when she heard a loud snap while getting out of bed one morning. Other than this incident and a slip on her porch in November 2000, during which, according to Claimant, she caught herself on the banister and only injured her right arm and side, Claimant sustained no other injuries during this time. In addition, while Claimant does take steroid medication for her asthma, she explained that her doctor only prescribes this medication for one week at a time and she has never taken steroid medication on a prolonged basis. Dr. Barnes in turn acknowledged that it would probably take prolonged use of steroids to bring on avascular necrosis.

While Dr. Barnes could not state for certain that the tailbone injury was the cause of Claimant's avascular necrosis, he explained that there is no way to be sure of the cause of this condition in anyone. In addition, Dr. Barnes never called Claimant's credibility into question when forming his opinion that the workplace injury was likely the cause of Claimant's hip problems. Because there is no way of ascertaining the cause of this condition, Claimant's credibility as to this issue is crucial. Although Claimant did not seek further medical treatment for her hip problems in the months after her injury or request authorization from Employer before going to see Drs. Ellis and Barnes and ultimately undergoing bilateral total hip replacement surgery, Claimant's explanation for her actions does illuminate the reasons behind her failure to consult with Employer before taking action. Claimant testified that since Employer's doctors had told her that she would heal on her own, she did not see much point in seeking medical treatment right

away. In addition, once Claimant left the shipyard, she did not think that she needed to ask Employer's approval before seeking treatment. I note as well that avascular necrosis is not a condition which develops immediately upon the occurrence of a traumatic injury. Due to the nature of this condition, it is not unusual that Claimant did not start having serious hip problems until several months after her workplace accident, since avascular necrosis apparently takes some time to develop. Accepting Claimant's version of events, then, I find that there is no other explanation for the onset of avascular necrosis in this case than that this condition developed as a result of her workplace accident. I find that causation exists as to Claimant's avascular necrosis.

Lower Back Pain and Knee Arthritis

Claimant has testified that since her hip replacement surgeries, she has suffered from back and knee pain. Dr. Barnes diagnosed Claimant with an extradural defect in her lumbar spine and arthritis in both knees. Dr. Barnes testified that Claimant, who has had difficulty walking since her hip surgeries, might have developed back problems and knee problems as a consequence of her altered gait. Thus, because I have previously found that Claimant's avascular necrosis is causally related to her employment, I find that Claimant is entitled to the 20(a) presumption with regard to her back and knee problems as well.

Employer argues that Claimant is not entitled to the 20(a) presumption with respect to any of her injuries, including the back and knee problems. Employer points out that Dr. Barnes' opinions on the cause of her back and knee problems are not based upon a reasonable degree of medical probability and are only speculation. While Dr. Barnes testified that Claimant's back condition and arthritic knees might be related to her workplace accident, he acknowledged that there was no way to be certain of the cause. Based on Dr. Barnes' inability to state within a reasonable degree of medical probability that Claimant's back and knee problems were causally related to her altered gait, I find that Employer has provided sufficient evidence to rebut the 20(a) presumption and I must now evaluate the record as a whole to determine the issue of causation as to Claimant's lower back pain and arthritic knees.

The medical records in this case indicate that Claimant did not complain of back pain or knee problems before she was injured at the shipyard, with the exception of one incident in June 2000 in which Claimant thought she pulled a muscle in her back when stepping off a porch. This injury apparently resolved on its own, as Claimant testified that she went on light duty for a short time and her back pain only lasted about a week. She never followed up with Dr. Williamson and returned to full duty without complaints before the injury in question occurred some months later. There is no doubt that Claimant has extreme difficulty walking. According to Dr. Barnes, if Claimant had no prior history of back complaints, it was more likely than not that her current back

complaints were the result of either the workplace injury itself or of Claimant's development of an abnormal walking pattern following surgery.

As to Claimant's knee problems, Dr. Barnes agreed that he could not definitively relate Claimant's knee arthritis to her workplace accident without knowing more of her medical history—i.e., whether she had knee problems in the past. Dr. Barnes' medical opinion on Claimant's knee condition is even more speculative than his opinion on her back problems. Implicit in his opinion, however, is the fact that Dr. Barnes could also not say that Claimant's knee arthritis was totally unrelated to her workplace injuries. Furthermore, since Employer has produced no medical records indicating that Claimant complained of either knee or back problems in the past, with the exception of the pulled muscle injury in June 2000, there simply is not enough evidence in the record to necessitate a finding of no causal connection between the knee and back problems and the avascular necrosis. In addition, I personally observed Claimant's movements during the course of the hearing. Common sense would indicate that the extreme difficulty with which Claimant moved about would cause undue strain on her knees and likely cause problems. In this case, I am willing to give the Claimant the benefit of the doubt. Accordingly, I find that Claimant's knee and back problems are casually related to her altered gait, which is a result of Claimant's surgery for avascular necrosis, which itself has already found to be causally related to her workplace injury.

Nature and Extent

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic

harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

In this case, Dr. Barnes testified that Claimant has not reached MMI. The Parties do not dispute his opinion in this matter. Dr. Barnes anticipated that Claimant will be assigned a permanent impairment rating and some permanent restrictions after reaching MMI but expressed his hope that Claimant's condition will improve significantly in the future so that she will be able to return to employment. For the time being, however, it is clear that Claimant is unable to perform any employment, let alone her full duty job as an insulator in a shipyard. I find that Claimant is temporarily totally disabled. However, Claimant is due no compensation with respect to her right hip injury because her claim is time-barred under Section 12.

Prior to the date Claimant walked off her job with Employer, she had been working at the same job she had before her injury. Even if she had difficulty in performing this job, she never made this known to Employer. I find, based on Employer's previous willingness to accommodate Claimant's restrictions, that Employer would have again provided restricted duty to Claimant if Claimant had not walked off the job. I note that Claimant continued working and she only quit working for Swetman Security in order to undergo right hip surgery. Thus, Claimant was not disabled as to her right hip until the date that she underwent total hip replacement surgery on that hip. Following that same line of logic, Claimant was not totally disabled from her left hip injury until she underwent the total hip replacement surgery on June 7, 2002. After her surgery, Claimant developed some causally-related back and knee problems, which have also contributed to her temporary total disability. Thus, I find that Employer shall pay Claimant temporary total disability compensation commencing on June 7, 2002, and continuing until such time as Claimant reaches MMI.

Average Weekly Wage

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is permanent

and continuous. Duncan-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. § 910. Section 10(a) applies where an employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-136 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to injury. Gatlin, 936 F.2d at 21, 25 BRBS at 28 (CRT); Duncan-Harrelson, 686 F.2d at 1341; Duncan, 24 BRBS at 135; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

When there is insufficient evidence in the record to make a determination of average weekly wage (AWW) under either subsections (a) or (b), subsection (c) is used. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). Subsection (c) is also used whenever subsections (a) and (b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Walker v. Washington Metro Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991).

Since Claimant did not work for substantially the whole year preceding her injury, nor did she work a constant number of hours each week during her term of employ at the shipyard, I find that neither § 10(a) nor § 10(b) is applicable. Rather, § 10(c) is the best method of calculating Claimant's AWW. In this case, I agree with Employer that the most accurate way to determine Claimant's AWW is to add up all of her wages earned while working for Employer in the eight months before her workplace injury in October 2000 and divide this sum by the number of weeks worked during that time period. According to wage records, Claimant earned $14,079.06 and worked for twenty-nine weeks before her injury. (CX. 9). Thus, Claimant's AWW is $485.48, with a corresponding compensation rate of $323.82.

Claimant argues that she is due back compensation for the period from October 2, 2000, through October 5, 2000. Employer argues that under Section 6(a) of the Act, it is not obligated to pay the first three days of Claimant's disability compensation because her workplace injury resulted in a disability of less than fourteen days. However, as the Court has found that Claimant is owed temporary total disability benefits from June 7,

2002, and continuing, Section 6(a) no longer applies in this case. Employer shall pay Claimant temporary total disability compensation for the time period from October 2, 2000, through October 10, 2000, based on an average weekly wage of $485.48, with a corresponding compensation rate of $323.82. In addition, Employer shall pay Claimant temporary total disability compensation beginning on June 7, 2002, and continuing, based on an average weekly wage of $485.48, with a corresponding compensation rate of $323.82.

Medical Expenses/Choice of Physician

Although Claimant's claim for compensation is time-barred, a claim for medical benefits under Section 7 is never time-barred. Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988). An employer has a continuing obligation to pay an injured employee's medical expenses, even if the claim for Section 8 compensation is time-barred by Section 12 or 13. Strachan Shipping v. Hollis, 460 F.2d 1108 (5th Cir. 1972), cert. denied, 407 U.S. 887 (1972).

Section 7 of the LHWCA provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979).

Section 7(c)(2) of the Act provides that when the employer or carrier learns of an employee's injury, either through written notice or as otherwise provided by the Act, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or deputy commissioner. See 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. Lloyd, 725 F.2d at 787, 16 BRBS at 53 (CRT); Swain, 14 BRBS at 664; Washington v. Cooper Stevedoring Co., 3 BRBS 474 (1976), aff'd, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); Buckhaults v. Shippers Stevedore Co., 2 BRBS 277 (1975).

It is undisputed in this case that Claimant never requested Employer's authorization before seeking treatment with Drs. Ellis and Barnes. Claimant argues that the issue here is whether the diagnoses by Drs. Warfield and Hudson, who told Claimant

that her fractured coccyx would heal on its own and released her without permanent restrictions shortly after her accident, constitute a refusal of further medical treatment such that Claimant's failure to request authorization can be excused.

Claimant argues that she was misdiagnosed by Drs. Warfield and Hudson, citing the case of Matthews v. Jeffboat, Inc., 18 BRBS 185 (1986), to support her argument that the recommendation that Claimant return to work was tantamount to a refusal by Employer to provide further medical treatment. In Matthews, the claimant suffered an injury to his back in January 1981. Id. at 187. The employer's nurse referred the claimant to a doctor who diagnosed him with muscle spasm and back sprain on February 3, 1981, and told that his condition would resolve on its own. Id. at 187-88. The next day, the claimant made an appointment with his family physician, ultimately leading to the diagnosis of spinal stenosis, a condition which required surgery. Id. at 188. The Board affirmed the administrative law judge's finding that the first doctor had misdiagnosed the claimant and that the treatment was tantamount to a refusal to treat in light of the subsequent diagnosis of spinal stenosis requiring surgery. Id. at 189.

I find the present case to be distinguishable from Matthews for several reasons. First, despite Claimant's testimony to the contrary, the medical records indicate that Claimant never mentioned her hip problem to Dr. Warfield or Dr. Hudson. Since these doctors did not know Claimant was experiencing hip pain, they could not be said to have misdiagnosed or failed to treat her for it. Instead, they could only treat her for the complaint that she expressed at the time—namely, tailbone pain. Secondly, when Drs. Warfield and Hudson told Claimant that her condition would resolve on its own, she never challenged their opinions, attempted to follow up with either of them or sought Employer's approval for a second opinion. Although Claimant saw Dr. Williamson in December 2000, she admitted that she did not have hip or back pain at that time. In fact, Claimant testified that her tailbone pain did subside somewhat over the year, although it never totally dissipated. Unlike the claimant in Matthews, who immediately went to his family physician after being misdiagnosed by his initial doctor, Claimant waited for over a year before going to another doctor. When Claimant finally did decide to seek another opinion, she never asked Employer to approve her to see a different doctor. As a result, there was no way for Employer or its approved doctors to know that anything was wrong with Claimant, who herself testified that she began feeling hip pain only a few months before she went to see Dr. Ellis in January 2001. Regardless of Claimant's explanation for her failure to request approval from Employer or to see a second opinion immediately after Dr. Hudson told her that her tailbone injury would heal on its own, Claimant has failed to provide any evidence to support a finding that she was misdiagnosed by Drs. Warfield and Hudson.

Moreover, Claimant's argument that Drs. Warfield and Hudson misdiagnosed her is beside the point, given the nature of her condition. In any case, the fact remains that Drs. Warfield and Hudson treated Claimant for a tailbone injury, not a hip injury. As the

medical evidence in this case has shown, avascular necrosis is a condition that develops over time. Since, as the Court holds, Claimant's workplace injury is the cause of her avascular necrosis, this condition could not have been treated at the time of the tailbone injury, as it had yet to develop. Accordingly, Claimant cannot be said to have changed physicians when she chose to treat with Drs. Ellis and Barnes, because these two doctors were treating her for a different condition altogether. Under Section 7(c)(2), once Claimant filed the LS-203, putting Employer on notice about her avascular necrosis and related problems, Employer was required to authorize the medical treatment by Dr. Barnes, Claimant's chosen orthopedist, as Dr. Barnes was the first orthopedist to treat Claimant for the avascular necrosis, which presumably had not developed yet when she saw Dr. Hudson.

If an employer has no knowledge of the injury, it cannot have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. McQuillen v. Horne Bros., Inc., 16 BRBS 10, 16 (1983). An employer is considered to have knowledge when it knows of the injury and has facts that would lead a reasonable person to conclude that it might be liable for compensation and should investigate further. Harris v. Sun Shipbldg. & Dry Dock Co., 6 BRBS 494 (1977), rev'd on other grounds sub nom. Aetna Life Ins. Co. v. Harris, 578 F.2d 52 (3d Cir. 1978). An employer has not, however, neglected to provide or authorize treatment after the employer is aware of the injury if the claimant never gave the opportunity to refuse or authorize treatment. Martin v. Marinette Marine Corp., 19 BRBS 60 (1986); Mattox v. Sun Shipbldg. & Dry Dock Co., 15 BRBS 162, 172 (1982). In Mattox, the employer's mere knowledge did not establish neglect or refusal because the claimant never requested care. Id.

Although Employer is responsible for paying Claimant's medical benefits related to her treatment with Dr. Barnes, as discussed above, Claimant is not entitled to reimbursement for any medical expenses incurred before Employer was notified of the injury through the LS-203, including Claimant's treatment with Dr. Ellis as well as Claimant's total hip replacement surgery on her right hip. I find that Employer is responsible for all reasonable and necessary medical expenses related to the treatment of Claimant's avascular necrosis, lower back pain and knee arthritis that were incurred after March 18, 2002.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Claimant's claim for compensation benefits related to her right hip injury under the Act is time-barred and is hereby **DENIED**.

2. Section 6(a) does not apply since Claimant has suffered her disability for a period of more than fourteen days. Employer shall pay Claimant temporary total disability compensation for the time period from October 2, 2000, through October 10, 2000, based on an average weekly wage of $485.48, with a corresponding compensation rate of $323.82.

3. Employer shall pay Claimant temporary total disability compensation for the time period beginning on June 7, 2002, and continuing, based on an average weekly wage of $485.48, with a corresponding compensation rate of $323.82.

4. Employer shall pay all reasonable and necessary medical expenses related to the treatment of Claimant's avascular necrosis, lower back pain and knee arthritis that were incurred after March 18, 2002.

5. Employer shall receive a credit for benefits and wages paid.

6. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

7. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

ORDERED this 2nd day of October, 2003, at Metairie, Louisiana.

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LARRY W. PRICE
Administrative Law Judge

LWP:bbd